

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP2590-CR

Cir. Ct. No. 2003CF7147

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEYMOND RICHARD TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 SNYDER, P.J. Deymond Richard Turner appeals from an order denying his motion to suppress evidence and from a judgment of conviction for possessing more than forty grams of cocaine with intent to deliver, contrary to

WIS. STAT. §§ 961.16(2)(b)1. and 961.41(1m)(cm)4. (2003-04).¹ Turner contends that the warrantless search of the premises where the drug evidence was obtained violated his right to be free from unreasonable search and seizure. Specifically, Turner contends that consent to search his residence, which was given by his co-tenant in Turner's absence, was not voluntary. We disagree and affirm the order denying the motion to suppress as well as the judgment of conviction.

FACTS AND PROCEDURAL BACKGROUND

¶2 Turner was the subject of an investigation of illegal drug sales at a Milwaukee tavern. The investigating police officers knew that Turner did not have a valid Wisconsin driver's license, that he had an active outstanding traffic warrant, and that he lived at a particular address in Milwaukee with his girlfriend Suzanne. The officers set up a drug buy from Turner through a confidential informant and placed Turner's residence under surveillance.

¶3 On March 14, 2003, officers observed Turner leave his residence. The officers believed that Turner was en route to a drug deal with the confidential informant. They stopped Turner's vehicle based on Turner's driver's license status and the active warrant. Turner was taken into custody on the outstanding warrant and the officers searched his vehicle. No drugs were found in the vehicle. Four officers then proceeded to Turner's residence to continue the drug investigation. Turner denied living at the house in question and did not accompany the officers there. Furthermore, Turner was not asked for consent to search the residence.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

¶4 The officers arrived at Turner's home and rang the doorbell, and Suzanne came to the front door. She had worked the night before and had been sleeping when the officers arrived. Suzanne went to put on some clothes and then returned to the front door where officers told her that Turner had been arrested. The officers requested permission to enter the residence to speak with her. They entered the foyer and explained to Suzanne that they were conducting a narcotics investigation and believed that there may be illegal drugs in the residence. Suzanne was not advised that Turner had been arrested for a traffic violation.

¶5 Suzanne was asked to consent to a search of the house. Detective Steve Dettman testified at the suppression hearing that Suzanne consented to the search of the residence, that no threatening remarks or promises were made to her by the officers, and that he did not remember if Suzanne was told she could refuse his request for consent to search. Dettman stated that Suzanne indicated that Turner spent time in the basement and unlocked a padlocked basement room for the officers to search. Nothing was found in the basement; however, officers discovered 59.49 grams of cocaine, a loaded gun, an electronic gram scale and \$6225 in an upstairs bedroom.

¶6 Suzanne testified at the suppression hearing that the officers threatened her and claimed that her house, car, job and children could be taken from her if she did not cooperate. She stated that the officers never asked for permission to search the residence but instructed her to show them where Turner kept his things. Suzanne further stated that the officers presented a consent form for her to sign after the search was over and that she refused to sign the form because she believed that she did not consent to the search.

¶7 Detective Mitchell Ward testified that prior to the suppression hearing, he observed Turner talking to Suzanne in the courthouse hallway. Suzanne was visibly upset. Ward stated that he overheard Turner tell Suzanne to testify that she did not let the police into the house. Suzanne had red eyes and seemed on the verge of tears as she approached the witness stand and began crying nearly from the outset of her testimony.

¶8 Following the hearing, the circuit court held that Suzanne consented to the search. It determined that the testimony of Dettman and Ward was credible and discounted Suzanne's testimony because of her bias toward Turner, her demeanor on the stand, and what the court described as the inconsistency between her actions and her testimony. Turner subsequently pled guilty and was sentenced. He appeals.²

DISCUSSION

¶9 Turner presents one issue, succinctly stated: “Was [Suzanne’s] consent voluntary?” A warrantless entry and search of premises with the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant is a recognized exception to the search and seizure protections under the Fourth Amendment. ***Georgia v. Randolph***, 126 S. Ct. 1515, 1518 (2006). The Fourth Amendment requires that “consent not be coerced, by explicit or implicit means, by implied threat or covert force.” ***Schneckloth v. Bustamonte***, 412 U.S. 218, 228 (1973).

² The suppression issue is not waived, despite the guilty plea, under WIS. STAT. § 971.31(10).

¶10 Whether consent to a search was voluntary or the product of duress or coercion is determined independently by applying constitutional principles to the circuit court's findings of historical and evidentiary fact. *State v. Hughes*, 2000 WI 24, ¶41, 233 Wis. 2d 280, 607 N.W.2d 621. The burden falls on the State to show that the individual gave consent and that he or she did not consent as a result of duress, threats, coercion or promises. *Id.*, ¶42. If the State demonstrates that consent was voluntary, the burden then shifts to the defendant to show that the police used improper means to obtain that consent. *Id.* No single factor is dispositive; rather, we look to the totality of the circumstances surrounding the consent to search. *Id.*, ¶41.

¶11 Here, the State put forth evidence through the testimony of Dettmer and Ward to demonstrate that Suzanne not only consented to the search, but also affirmatively assisted the officers in performing the search. Turner counters that the police used improper means to obtain Suzanne's consent.

¶12 First, Turner argues that the police were deceptive and misleading when they failed to inform Suzanne that Turner had been arrested for a traffic violation, but instead told her they were involved in a narcotics investigation. Dettman testified that Turner was stopped for operating a vehicle with his license revoked after he left the residence and that he told Suzanne "that Deymond Turner had been arrested a short distance away after just leaving her house." He further stated that he "explained to her the circumstances of the arrest and why we were at her house." Specifically, Dettman told Suzanne he wished to "search the residence to make sure that there [were] no narcotics that were concealed in the residence." "Suzanne's only response was, 'I don't recall them telling me why they [were] there.'"

¶13 The circuit court found that Dettman “explained to [Suzanne] that [Turner] had been arrested on a traffic violation, and that they were involved in a narcotics investigation.” The circuit court’s findings are supported by the record. Turner concedes that Dettman’s statement to Suzanne about the arrest was true; further, he does not dispute that Dettman was conducting a narcotics investigation. We ascertain nothing deceptive or misleading about Dettman’s statements to Suzanne.

¶14 Turner also argues that the nature of the police procedure and number of officers present was intimidating to Suzanne. Suzanne testified that the police threatened to take away her car and her children and to have her fired from her job if she did not consent to the search. Coercive or improper police practices, such as threats intended to overcome resistance, will support a contention that consent was involuntary. *See State v. Clappes*, 136 Wis. 2d 222, 245, 401 N.W.2d 759 (1987). Here, however, three officers were present at the residence.³ Turner concludes that “[t]his type of police presence was designed to overcome any resistance that [Suzanne] would have in giving consent.” Turner’s conclusion is unsupported by any legal analysis, citation to legal authority, or record evidence.⁴ Dettman testified that Suzanne invited the officers in and helped them perform the search, that no threats were made, and that at no time did Suzanne appear to be in

³ The record indicates that a fourth officer joined them after they had already entered the residence.

⁴ In a similarly unsupported argument, Turner asserts that “[Suzanne] was in a compromising position when the police arrived at her house” and that officers “used these compromising circumstances to gain an intimidating presence to overcome any possible resistance.” He points out that she had been sleeping, was not properly dressed, had worked late the night before, and had two small children present. He fails to explain, however, how the police turned these circumstances to their advantage. Furthermore, the record indicates that the officers waited outside while Suzanne got dressed and then received permission to enter the residence.

any distress. The circuit court deemed Dettman's testimony credible, and the record supports that assessment.

¶15 Turner also argues that Suzanne was not told that she had the right to refuse to consent to a search, thus rendering her consent involuntary. We agree that failure to inform an individual that consent may be withheld is a relevant consideration; however, the United States Supreme Court has rejected the proposition that police officers must, in every case, inform citizens of the right to deny permission to search. See *United States v. Drayton*, 536 U.S. 194, 206-07 (2002) (the government need not establish knowledge of the right to refuse as the *sine qua non* of an effective consent); see also *State v. Phillips*, 218 Wis. 2d 180, 203, 577 N.W.2d 794 (1998) (The failure to inform an individual of the right to withhold consent "weighs against, but is not fatal to, a determination of voluntary consent.").

¶16 Here, Dettman could not recall if he told Suzanne that she could refuse to consent to the search. Suzanne testified that she was not advised she could refuse consent. There is no signed consent form in the record. The circuit court acknowledged that "the state has certainly not shown that [Suzanne] was told that she had a right to deny consent." We are satisfied that the circuit court properly considered this factor in its analysis of the totality of the circumstances.

¶17 Finally, Turner contends that the method employed by the police to get into and search the residence violated the spirit of the Fourth Amendment. He asserts that the officers were disappointed when they did not find any narcotics on Turner or in his vehicle at the traffic stop, that the officers did not have probable cause to search Turner's residence and the officers decided to go the consent route in obtaining consent to search from a co-occupant of the residence. Accepting all

of that as true, the issue in this case still remains whether Suzanne voluntarily gave her consent to search the residence based on the totality of the circumstances. As the above analysis demonstrates, she did.

CONCLUSION

¶18 We conclude that the State met its burden to show that Suzanne did not consent to the search as a result of duress, threats, coercion or promises. *See Hughes*, 233 Wis. 2d 280, ¶42. Furthermore, Turner failed to meet his burden to show that police used improper means to obtain her consent. *See id.* Accordingly, we affirm the circuit court order denying Turner's suppression motion and the judgment of conviction.

By the Court.—Judgment and order affirmed.

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